are self-executing[29], and that complaints should be resolved at the state level, not through preemptive federal rules.[30] Unlike the DOJ, which studiously avoids an analysis of the jurisdictional provisions of the 1996 Act, the Florida PSC relies on the specific language of Section 252 to support its conclusion that "the FCC is limited in its authority to resolve complaints relating to the agreements."[31]

The Georgia PSC shares the views of the Florida PSC that detailed national rules are not needed to facilitate interconnection negotiations

> The GPSC respectfully submits that an overly detailed rulemaking would not reflect the intent of Congress, would exceed the statutory authority of the FCC and would produce results contrary even to the intent of the FCC.[32]

Far from supporting the DOJ's apparent position that BellSouth has failed to negotiate in good faith with potential new entrants, the Georgia PSC attached to its comments a negotiated interconnection agreement between BellSouth and MCImetro dated May 14, 1996 that addresses many of the issues raised by Sections 251 and 252 of the 1996 Act. Rejecting DOJ's view that "absent national standards, the states would be faced with many complex issues and recalcitrant ILECs, a combination not likely to lead to the expeditious entry sought by Congress"[33], the Georgia PSC states:

> The heart of the Federal Act is the provision for the parties to negotiate...Overly proscriptive rules typically encourage litigation, delay tactics and stifle rather than

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29 Florida PSC Comments at 5.

30 Florida PSC Comments at 11.

31 Florida PSC Comments at 11.

32 Georgia PSC Comments at 2.

33 DOJ Comments at 17.

> simplify negotiations. Such rules can chill negotiations and force parties to accept "one size fits all" solutions which are suboptimal at best.[34]

Obviously, the parties charged by Congress with overseeing the negotiation process, the state commissions, do not share the view of the DOJ that detailed national rules are necessary to facilitate negotiated solutions, or that the existence of disputes during negotiations necessarily means that the ILECs are being "recalcitrant" or failing to negotiate in good faith.[35] Indeed, the blatant bias against the ILECs that permeates the DOJ comments vindicates the wisdom of Congress not to give the DOJ a decisional role in deciding Section 271 applications for entry into the interLATA market by the Bell companies.

### D. The Commission Must Not Bow To The Threats Of Certain IXCs To Inundate the Commission With Complaint Proceedings

Having failed to make convincing legal or policy arguments for explicit national rules, some parties such as AT&T resort to threats to inundate the Commission with complaint proceedings, which allegedly will require the Commission to resolve these issues in any event. AT&T speculates:

> The Commission would inevitably be required to define Section 251's minimum requirements...in literally scores or hundreds of separate enforcement proceedings that would be brought after a state commission approved or ordered an interconnection arrangement.[36]

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34 Georgia PSC Comments at 8.

35 DOJ conveniently ignores the fact that BellSouth has successfully negotiated interconnection agreements in Florida with Teleport Communications Group, Time Warner/Digital Media Partners, the Florida Cable Television Association (representing approximately 30 cable television providers), Sprint, Intermedia Communications, and Continental Cablevision. BellSouth has also reached agreements with MCImetro in Georgia and NEXTLINK in Tennessee. DOJ's unwarranted and unsupported assertion that negotiations are doomed to failure in the absence of explicit national rules is amply refuted by the existence of these negotiated agreements with a diversity of new entrants.

36 AT&T Comments at 9.

BellSouth notes that AT&T's predicate for its horror story is either totally illogical or patently disingenuous. The speculation that Commission action would be required to review negotiated agreements approved by the state commission is mystifying. If the parties have contracted voluntarily and the state commission approves the agreement under Section 252(e), the matter is at an end. BellSouth expects and hopes that the vast majority of negotiations will end in this way.

If , however, the state commission is required to arbitrate the agreement, and a party aggrieved by that decision seeks review in the federal district court, the limited issue before the court will be whether the state commission properly applied the requirements of Sections 251 and 252. This is a straightforward matter of statutory construction that is well within the capabilities of a federal district court. It would be unnecessary and inappropriate for the court to make a "primary jurisdiction" referral to this Commission. Since Congress entrusted to the state commissions the authority to implement Sections 251-252, none of the traditional criteria for a "primary jurisdiction" referral to the FCC would be present. Thus, the first type of proceeding cited by AT&T is unlikely to involve this Commission.

Second, AT&T speculates that the Commission will be inundated with complaints under Section 208 of the Act in the absence of explicit national rules. As in the first instance cited by AT&T, if the parties have reached a negotiated agreement, neither would have standing to file a formal complaint with the Commission. If the parties have gone through arbitration and judicial review, the matter is res judicata, and no formal complaint proceeding will lie. If, as AT&T seems to threaten in footnote 10 of its Comments, a party filed a formal complaint with the Commission during the pendency of negotiations or judicial review, the Commission can and should dismiss the complaint as premature, since the legality of the challenged conduct will be determined in a conclusory and binding fashion in the state litigation. To the extent that AT&T is asserting a right to collaterally attack the findings of a state commission or federal court in a Section 208 complaint proceeding, such a right does not exist.

Finally, AT&T speculates that the Commission will have to adjudicate compliance with Section 251 in connection with BOC applications for interLATA authority under Section 271 of the Act. Again, AT&T implies that it will be allowed to relitigate de novo whether negotiated or arbitrated agreements meet the requirements of Section 251. This notion is directly contrary to the language of Section 271. Under Section 271(c)(1)(A), "A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under Section 252 . . ." The determination as to whether the BOC is in compliance with Section 251 rests with the state commission under Section 271(d)(2)(B), which states:

> "Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)."

Nothing in Paragraph 271 requires or permits the Commission to conduct a de novo review of the BOC's compliance with Section 251 in a Section 271 proceeding. Again, AT&T speculates the existence of a burden on the Commission where none can lawfully occur: the "literally hundreds of overlapping review and enforcement proceedings"[37] envisioned by AT&T are a figment of its corporate imagination.

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[37] AT&T Comments at 11.

Indeed, AT&T's doomsday scenario of scores or hundreds of enforcement proceedings being presented to the Commission is far more likely to come to pass if the Commission attempts to adopt explicit national rules than if it refrains from such action. If the Commission adopts broad, non-prescriptive guidelines, there will be little tension between the Commission's rules and the states' arbitration decisions. If the Commission insists on explicit rules having preemptive effect, and if those rules are affirmed on appeal, every state arbitration decision enacted in the meantime will require review under the Commission's new standards. This is far more likely to result in numerous "primary jurisdiction" referrals and Section 208 complaints than if the Commission adopts broad guidelines to assist the States in arbitrating disputes under the 1996 Act.

## IV. THE COMMISSION SHOULD NOT ADOPT DETAILED RULES THAT UNDERMINE THE CORE ELEMENT OF SECTION 251--CARRIER-TO-CARRIER NEGOTIATED AGREEMENTS

### A. Technical Feasibility, Interconnection, And Unbundling

As anticipated, most potential new entrants rallied around the Commission's proposals to adopt sweeping national imperatives for implementation of the unbundling and interconnection provisions of the Act. Indeed, many urged the Commission to develop rules in excruciating detail. Their motives are twofold and plainly clear: to skew and effectively undermine the Congressionally mandated negotiation process and to lay a groundwork of impossible tasks for BOCs to meet before entry into the interLATA market. The Commission should take a step back from the proposals in its Notice and consider how they have been seized upon by parties with such anticompetitive intent. Instead of facilitating such abuses of process with detailed, microregulation, the Commission should follow the clear indication from Congress and adopt rules that support, rather than supplant, good faith negotiations between parties.

### 1. Technical Feasibility

One of the most pivotal criteria upon which a request for interconnection or unbundling of a network element turns is the concept of technical feasibility. Practically every party echoed the Act's mantra that interconnection and unbundled network elements must be made available "at any technically feasible point." As the comments of IXCs and others reveal, however, unless the Commission adopts an interpretation of this clause that reflects basic tenets of reasonableness and reality, IXCs will forever be able to block BOC entry into their protected enclave. Such a result would be directly contrary to Congress's express intent to permit the BOCs rapidly to enter that market and to force an end to IXCs' cartel-like pricing behavior.[38]

To the extent there was consensus among the parties in this area, it was on the point that the Commission's definition of technical feasibility must be a "dynamic" one. Beyond that simple agreement, however, the consensus breaks down. According to the IXCs' notion of "dynamic," the term would be so loose and malleable as to render practically any conceivable interconnection or unbundling arrangement "technically feasible" for purposes of the ILECs' obligation to provide it under the Act. For example, AT&T and MCI would consider arrangements technically feasible under the Act even where an ILEC had no mechanism to ensure that the point of interface was

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[38] See, BellSouth Comments, Policy and Rules concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, at 4-16, filed April 25, 1996. This pricing phenomenon has been recognized by both Congress and the investment community. See, 141 Cong. Rec. E669-670 (daily ed. March 23, 1995) (statement of Rep. David E. Bonior quoting Jack B. Grubman) "MCI...filed for a 3.9% across-the-board rate increase. We fully expect AT&T, Sprint and the second tier carriers to follow suit."

secure, maintainable, or provisionable.[39] And, once an arrangement is determined under the IXCs' interpretation to be feasible for one ILEC, it would become an obligatory point of interconnection for just about any other ILEC. Thus, under the IXCs' view, a definition of technical feasibility would be "dynamic" if it were enforceable and if it was enforced across ILECs without adequate regard to differing facts and circumstances surrounding disparate interconnection or unbundling requests.

The better and more reasonable approach -- and, importantly, the one most consistent with the Act -- is to regard the definition of technical feasibility as "dynamic" if it is accommodating of a variety of results. That is, a dynamic application of the technical feasibility standard should accept variances under different circumstances, not dictate a result applicable across the board. To that end, the Commission should ensure that its rules do not result in a de facto and preemptive determination that an interconnection or unbundling arrangement voluntarily entered into by one ILEC is technically feasible for all other ILECs under the Act.

Adoption of this dynamic and adaptable notion of technical feasibility is consistent with the Act's reliance on negotiation between the parties to determine what interconnection or unbundling is feasible under the circumstances. ILECs clearly have the duty to provide interconnection where it is technically feasible. It is their statutory obligation to do so. Yet, the

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39 AT&T Comments at n.37; MCI Comments at 12. This narrow focus on the feasibility of interconnection as a physical or software "connection" ignores the fundamental and express expectation that interconnected networks or facilities also be interoperable. 1996 Act, sec. 101, §256. In addition, in the absence of appropriate support systems to ensure the security, reliability, provisioning, maintenance, or other operational characteristics of the interconnection, ILECs may be unable to meet their other statutory obligations to ensure that any interconnection is "equal in quality" to that provided to itself or another carrier. 1996 Act Sec. 101, §251(c)(2)(C). Lack of a capability to ensure equal quality thus renders an interconnection technically infeasible for purposes of the Act.

Act allows the parties to the interconnection negotiation to arrive at mutual agreement whether a requested interconnection is technically feasible under the circumstances. And, those circumstances are to be expected to vary including different technologies among ILECs, different technologies within an individual ILEC's network, differences in requesting carriers' networks or needs, existence of support systems, and development and implementation costs.

Not to be underestimated, too, is the significance of a relevant timeframe to the notion of technical feasibility. With enough time (and other resources), of course, practically any interconnection arrangements that are not feasible today could likely be made feasible. However, the Act's adoption of the technical feasibility standard does not incorporate such an open ended relevant timeframe.

Instead, the Act requires a more "current ability" view. The Act is clear in its purpose to promote rapid development of competition in all telecommunications markets. Congress did not intend that BOC entry into the interLATA business be held up while costly and large scale research, development and testing take place to convert theoretically feasible interconnection points into practicable interconnection points in the local exchange.

To conclude otherwise would place power in the hands of IXCs that Congress did not intend. As self-anointed guardians at the gate to BOC entry into the interLATA business, IXCs have every incentive to erect obstacles to BOC satisfaction of Section 271 checklist requirements. With an open ended relevant timeframe, IXCs would be able to demand unbundling or interconnection in a manner that is not presently feasible in a practicable sense, and then sit back and wait while the ILEC expended considerable resources to make the requested arrangements feasible, all the while asserting the ILEC's non-attainment of the Act's unbundling and interconnection requirements. Moreover, once the time had passed and the resources been expended, the requesting carrier might walk away from its request, having achieved its main objective. To guard against opportunities for IXCs to act on these clearly anticompetitive incentives and thereby to manipulate the timing of BOC entry into the interLATA market, the Commission should acknowledge that the Act's technical feasibility requirements are to be considered in a "current-view" relevant timeframe

Indeed, the outer boundary of the appropriate relevant time frames for consideration of technical feasibility is suggested by Section 271(c). Pursuant to that section, BOCs are permitted to petition for interLATA authorization ten months after the effective date of the Act in the absence of a request for interconnection. A BOC will be considered not to have received a request for interconnection if, even within that ten month period, a competing provider has failed to comply "within a reasonable time" with its obligations under a negotiated agreement. Thus Section 271(c) reveals that Congress envisioned agreements under which parties' obligations would be susceptible to implementation "within a reasonable time" and within less than ten months from the effective date of the Act. Arrangements that require substantial support system modifications, network reliability measures, or vendor developmental effort beyond this relevant timeframe are not considered currently technically feasible for purposes of Section 251 and 271 obligations.[40]

Parties' claims that ILECs have little incentive to make technically feasible interconnection available are obviously wrong for at least two reasons First, BOCs, in particular, have

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40 Of course, parties remain free to negotiate for interconnection and unbundling arrangements that may become feasible over a longer timeframe.

extraordinary incentives to make interconnection available at all points where it is feasible to do so as soon as possible because that makes entry into the interLATA business achievable as soon as possible. In contrast, it is the IXCs' incentive to delay that entry by requesting interconnection or unbundling that they know is not currently feasible in order to be able to press their claims of stonewalling by the BOCs. By erecting such artificial obstacles to BOC satisfaction of the competitive checklist, the IXCs are hopeful of maintaining a rear guard defense of their long distance market. For example, IXCs have a three year prohibition from jointly marketing long distance and local service. After that, regardless of whether the BOCs have in-region interLATA relief, the IXCs can commence joint marketing activities. It is thus the IXCs who have the incentive to abuse the notion of technical feasibility to further their own oligopolist interests.

Second, these parties' reasoning ignores that in many instances an ILEC's alleged lack of incentive to pursue the developmental effort necessary to support a requested interconnection point or unbundled element may be due to the requesting carrier's own refusal to be responsible for the costs of such developmental work. ILECs should not be expected to absorb the costs of providing new interconnection opportunities to competitors or bear the risk of a requesting carrier's subsequent decision to discontinue use of the unbundled facility.[41] Rather, to the extent an ILEC incurs costs in satisfying an interconnection or unbundling request, including developmental cost to overcome any identified existing technical or operational limitations, those

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[41] See, Northern Telecom Comments at 6: [T]he Commission should avoid imposing interconnection obligations that could require [ILECs] (or a manufacturer) to expend significant resources developing or deploying requested capabilities where there will be inadequate demand to support the expenditure. There are significant costs involved in developing new interconnection or unbundling points, including research and development of the capability, development and documentation of the interface standards, testing and deployment." (emphasis added).

costs are directly related to the interconnection requested and under any measure of incremental cost would have to be recovered from the interconnecting parties. A requesting carrier's attempt to avoid responsibility for any such costs will clearly create a disincentive for an ILEC to undertake development activity.

**2. Specific Points Of Interconnection And Unbundling**

BellSouth still maintains that there is no need for the Commission to specify points of interconnection in its rules since the minimum set is already spelled out in the Act. Nonetheless, to the extent it must adopt rules to implement the Act, BellSouth agrees that the Commission should require no more than is mandated by the Act. Accordingly, the Commission should confirm that the core set of unbundled interconnection points consists of the trunk and loop side of the local switch, transport facilities, tandem facilities, and signaling transfer points. Of course, parties are free to negotiate additional points, but those should not become de facto mandatory "core" requirements.

Beyond the statutory core set of interconnection and unbundling points, the Commission must be wary of parties' claims that other points also must be required, particularly to the extent those claims are based on the nominal representation of technical feasibility in the comments. Subloop unbundling presents the clearest example. Several potential new entrants blithely suggest that because an ILEC configures its loop plant by interconnecting wires at different points, each of those points represents a technically feasible point of interconnection for third parties.[42] That notion, of course, has been soundly debunked by numerous ILEC filings.[43] The lesson to be

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[42] American Communications Services at 36-38, MCI at 29.

[43] SWB at 38, USTA at 32, Affidavit of Chuck Jackson, ALLTEL at 10, GTE at 33-37.

learned, however, is that potential new entrants' claims of technical feasibility in support of their requests for interconnection or unbundling are not to be taken at face value. The issues are far more complex than these parties' simplistic and conclusory assertions reveal. Hence, the "wish lists" of AT&T, MCI, and others are an obviously deficient mechanism for designating unbundling and interconnection obligations under the Act.

The Commission should view potential entrants' representations of substantial need for various unbundled elements with considerable skepticism.[44] For example, both MCI and AT&T attempt to establish a need for electronic access to a number of ILEC "back office" systems. The availability of such capabilities, however, while clearly an appropriate subject for negotiation between the parties, is hardly necessary for successful participation by competitors for local exchange service.[45]

The fallacy of the carriers' argument is that it is built on the assumption of a non-existent predicate condition. For example, twice AT&T posits that "*if* ILECs make it harder for customers to order and receive service from ALECs" or "*if* switching local carriers is a lengthy or

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[44] "In determining what network elements should be made available . . . the Commission shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 1996 Act, sec. 101, § 251(d)(2).

[45] In discussing these issues here, BellSouth does not concede that operation support systems are network elements under the Act. These systems are not "facilit[ies] [such as local loops] or equipment [such as switching] used in the provision of a telecommunications service", nor are they "features, functions, [or] capabilities that are provided by means of such facility or equipment." 1996 Act, § 101(29). Indeed, AT&T appears to glide over this discrepancy in its plea by first asserting that development of local competition is more likely to depend on access to such systems under either § 251(c)(3) (unbundling) or § 251(c)(4) (resale) and then presenting its case only in the context of resale. As has been shown, the two are not interchangeable concepts under the Act.

laborious process for customers," ALECs will be disadvantaged.[46] Then, on the basis of these conjectured concerns, AT&T asserts that the Commission must require extensive national standards for interfaces to a host of ILEC operations support systems.[47] As shown below, AT&T has substantially overstated its case by presenting dire consequences for a situation that does not even exist.

AT&T's hypothetical circumstance is that in the absence of electronic access to ILECs ordering and provisioning systems, new entrants will be unable to entice customers to switch to their service because it will be burdensome for the customer to do so. The truth is, particularly in a resale environment, the switch from one local carrier to another will be transparent to the end user, regardless of the mechanism employed between the ILEC and the new competitor to effectuate that change. Indeed, the overwhelming bulk of customers that AT&T or MCI or any other IXC attempts to convert to its local service will be its existing base of interexchange customers who already receive local service from the ILEC. The principal systems activity associated with customers who elect to change local carriers will be to change the billing arrangements for that account.[48] That is, the ILEC will cease billing the end user for local service at the retail rate and begin billing the new service provider at the wholesale rate on the date

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46 AT&T Comments at 34, 36 (emphasis added).

47 AT&T Comments at 37-38. Interestingly, it is detailed developmental and technical requirements such as those proposed by AT&T that can render the very capability it is seeking technically infeasible in the near term.

48 In addition, by handling resellers' customer change orders though the ILEC's existing service ordering systems in the same manner as the ILEC's own customers, directory assistance, directory listing, and LIDB databases will automatically be populated in the same intervals. No separate direct access to these systems is necessary.

agreed upon between the end user and the new service provider.[49] The ILEC will send the end user a final bill reflecting service through the effective change date, but all charges from that date forward will be billed by the new service provider.

From the customer's perspective, however, it does not matter how the ILEC and the new service provider have communicated to effectuate that change. The customer does not care whether the service order change was communicated by real-time electronic connection, by fax, by e-mail, by voice call, or by smoke signals. Because the customer has had contact only with the new entrant to change service providers, and because the change can take place transparently to the customer, there is no "lengthy or laborious process" to which customers would be exposed that could dissuade them from switching to the new competitor. Accordingly, the hypothetical hurdles erected by AT&T and MCI do not exist, and it cannot be argued that new carriers "must have" electronic access to ILECs' systems to overcome these hurdles or for effective competition to develop. Rules that would make such access mandatory are therefore not warranted.

Of course, as noted above, the absence of rules will not mean that new entrants are unable to pursue electronic interfaces with ILECs through the negotiation process. In fact, BellSouth has been involved in extensive development of electronic interfaces to a number of its "back office" systems to facilitate resale carriers' management of their customers' services. In addition, facilities based carriers will generally be able to take advantage of the same ordering, processing, provisioning, repair, maintenance and billing procedures--including electronic interfaces--that are provided to other interconnection customers. Moreover, BellSouth has been actively

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[49] Of course, that date can be no earlier than the date on which the end user elects to change carriers.

participating in the Ordering and Billing Forum's (OBF) ongoing initiative to develop standards for such capabilities, just as AT&T would have the Commission require.[50] Given that the processes are at work to develop the capabilities AT&T and others desire, the Commission should avoid imposing arbitrary and artificial deadlines on completion of such activities, lest the time constraint lead to suboptimal solutions.

In a similar sense, the Commission needs to be wary of some of the hidden minutiae in the purported needs statements of various parties. For example, buried in MCI's wish list are suggestions that the Commission require an ILEC to notify a wholesale customer (i.e., a resale carrier) before changing an end user service[51] or that ILECs make it possible for an end user to dial 611 and reach the repair center of the appropriate local exchange service provider.[52]

The first of these examples is simply anticompetitive. Whenever one service provider obtains appropriate authorization from a customer to become the service provider for that customer, the existing service provider should not be given notice prior to the changeover, lest an attempt may be made to interfere with the decision made by the customer. Such prior notice is not required today when a customer elects to change long distance carriers and would not be a prudent requirement associated with changes in local service providers.

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50 It is interesting to note that AT&T is encouraging referral of the development of a gateway-based electronic interface standard to the OBF since, to date, AT&T has been pressing for development of AT&T-specific direct interface capability, which may not have been a satisfactory solution for a majority of other resellers. BellSouth believes the better approach is to work through industry bodies such as OBF so that AT&T is not able unfairly to leverage its size into an advantage over other resellers or improperly to extend its effective dominance in the long distance market into the market for combined local and long distance service.

51 MCI Comments at 23

52 MCI Comments at 24

The second of these examples is neither realistically feasible[53] nor practical. Automatic routing of repair calls to the repair center of the reseller serving a customer would have to be based on identification of the service provider associated with the originating number. However, in repair situations, calls to a repair center are often made from lines other than the one experiencing trouble. For example, trouble calls may be placed from a neighbor's phone, from a car phone, or by another subscriber who is trying to get through to the subscriber with the line trouble. Under any of these circumstances, the customer reporting the trouble could reach the repair center of a local service provider that has nothing to do with the line that is out of service. Clearly, a preferred and simpler approach would be for the local exchange reseller to provide its customers with a dedicated telephone number to call for repair service.

The purpose of highlighting the foregoing examples, of course, is not to pick them out specially as items the Commission should not adopt. Rather, the purpose is to illustrate the risks inherent in an attempt by the Commission to adopt any of the specific wish lists suggested by parties favoring a set of detailed regulatory requirements. Most, if not all, of the wish list items are fraught with nuances and subtle, but powerful, meanings. Some are anticompetitive; some are simply not feasible; and others are susceptible to mutually satisfactory alternatives. Moreover, implementation of one carrier's wish list may not prove satisfactory to another carrier. The point

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53 In order to terminate the same dialed digits to multiple destinations depending on the originating line number, the originating switching system must have the intelligence to determine the desired routing. Routing information is contained in line class codes established in each end office switch for each class of service. This type of routing would require an ILEC to duplicate every resold class of service in a given central office for every reseller. There is a finite number of line class codes available in each switch type, creating a substantial likelihood of exhausting class of service capacity in many switches. Even if this routing were feasible, it would not address, as noted above, the majority of repair situations where the subscriber is calling from a phone other than his own.

is, requesting carriers have differing needs, ILECs have differing capabilities, and each request by a new competitor is likely to be affected by these differences.

As the foregoing examples also demonstrate, the Commission's rulemaking proceeding is not conducive to consideration of the collective universe of wish list items. Each item requires parsing at a level of detailed review that is not easily accommodated in policy-oriented comment and reply proceedings. Indeed, this proceeding, with its range of substantive and extraordinarily important policy ramifications coupled with its fast-track treatment and constrained opportunities for input, is particularly ill-positioned to support detailed requirements of the type proffered by potential new local service providers.

Fortunately, the Act does not require the Commission to undertake such a daunting task.[54] Recognizing the complexities that would be involved in implementing the new carrier relationships, Congress devised to the individual parties the responsibility and chore of examining and agreeing upon the nuances and details of individual relationships. Congress thus expressly refrained from directing the Commission to establish a set of top down requirements.

In lieu of detailed requirements, the Commission should adopt rules that establish a process to ensure that all carrier requests get fair and equal consideration, review, and discussion, as well as to ensure that potential new entrants are not able to abuse the privilege of making interconnection or unbundling requests of incumbent LECs. The bona fide request ("BFR")

[54] Nor does the Commission even have the authority to adopt such detailed rules. The Act clearly confers a right upon ILECs to negotiate with requesting carriers to reach unbundling and interconnection arrangements that are mutually satisfactory. Adoption of rules that preclude effective negotiation are not permitted by the Act. Moreover, the due process requirements of the Administrative Procedures Act would be violated by adoption of detailed requirements based on "wish lists" to which opposing parties had no meaningful opportunity to respond. See BellSouth's discussion in Section III. B.

process described by USTA provides an appropriate vehicle for achieving such a balanced result. Such a BFR process, built on concepts of mutual good faith, exchange of information, appropriate allocation of costs, and timely response, will foster cooperative rather than adversarial resolution of requests. Even for issues that cannot be resolved directly through negotiation based on this process, the process will help focus the dispute, facilitating the task that devolves upon the state as mediator or arbitrator.

Not withstanding the claims of some to the contrary, a negotiation process based on BFR principles will work and, in fact, is working. Carriers, both ILECs and potential new entrants, have not been sitting still waiting for this Commission to adopt detailed rules to implement the Act. Rather, they have been pursuing agreements for interconnection, unbundling, and resale both under the Act and under complementory State requirements. In BellSouth's region alone, BellSouth has executed agreements with eight new competitors, including an agreement with MCI. Comparable results are being reported in other areas as well. For example, Ameritech has reportedly executed six agreements with new competitors; NYNEX has four executed agreements, Bell Atlantic five, Pacific Bell has five agreements and U.S. West has 3 reported executed agreements.

These results also belie AT&T's plaintive and feeble claim that "negotiations will be exercises in futility"[55] in the absence of the Commission's adoption of the detailed nonnegotiated terms AT&T advocates. AT&T's strategic choice to attempt to bypass the statutorily commanded negotiation process through regulatory litigation proves nothing about the viability of a negotiation process when both parties enter into it in good faith. Clearly, AT&T has the

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55 AT&T Comments at 7

incentive for the process not to work if it believes that more onerous burdens imposed on ILECs by the Commission will facilitate a relatively cost-free entry into local exchange markets while significantly increasing the obstacles for BOC entry into the long distance market. The Commission should not countenance such gaming of the regulatory process.

**B. Pricing**

A variety of parties advocate that specific federal rules be adopted to govern the pricing of interconnection and unbundled elements, transport and termination, and retail services offered at wholesale rates. In these parties' view, the Commission has the unfettered discretion to prescribe strict pricing rules that would bind the state commissions in carrying out their responsibilities under Section 252 of the Act. They champion cost methodologies that serve their distinct, albeit errant, view of the Act's requirements.

Beyond the intrusiveness of the approach advocated by these parties, there simply is no statutory basis for detailed pricing rules. Moreover, the cost model favored by most competitors would deprive the ILEC of recovering the costs of the network facilities, components and services that competitors use. Denying ILECs cost recovery is contrary to the Act and would constitute unconstitutional taking of the LEC's property.

**1. National Pricing Rules Are Inconsistent With The Act**

Section 252 of the Act established pricing standards for the state commissions to follow in making determinations regarding the reasonableness of rates and charges for interconnection, unbundled elements, and transport and termination. Nothing in Section 252, authorizes the Commission to establish implementing rules, let alone detailed pricing rules that would reduce the state commission to a non-substantive role under the Act. Indeed, whatever authority the

Commission may have, it does not have the power to limit state commissions to prerogatives to those no greater than what the Commission's staff would have under delegated authority.

Commenters seize upon the view expressed in the Notice that the requirements in Section 251 that interconnection and unbundled elements be provided on terms, conditions and rates that are just, reasonable and nondiscriminatory and that the Commission establish implementing regulations, somehow empower the Commission to prescribe detailed pricing rules. The flaw in this position is that the Commission cannot create rules, under the guise of implementing Section 251, that have the effect of rewriting the framework of the statute.

Section 252 enumerates the pricing standards. Those guidelines are to be implemented by the state commissions. If Congress wanted a single method to be followed by the state commissions, then such a method would have been set forth in the statute. Alternatively, if Congress wanted the Commission to determine the cost method, it would have expressly granted the Commission such authority as it has elsewhere in Section 251.[56]

Congress followed neither of these alternatives. Instead, within Section 251, it established a statutory criterion for interconnection and unbundled elements of "just, reasonable and nondiscriminatory." This criterion is the same as that which underlies the Communications Act of 1934. It is well established that the just and reasonable standard encompasses a broad range of acceptable outcomes, not a single point. This fact contradicts the assertion that the just and reasonable language of Section 251 requires a single, federally imposed cost methodology.

[56] Under Section 251(e)(2), the Commission has the exclusive authority for determining the costs of numbering administration arrangements and establishing a competitively neutral recovery mechanism.

On the other hand, the just and reasonable criterion is fully consistent with the statutory framework that permits state commissions to exercise their own judgment and expertise in carrying out their Section 252 responsibilities. The fact that different state commissions may use different methodologies for determining cost for the purpose of determining whether prices are just and reasonable under Section 252 does not conflict with the just and reasonable criterion To the contrary, the broad range of outcomes that the criterion permit, enables independent state commission action. It is precisely this construction that gives full effect to the state commission's role under the Act and preserves the importance of negotiation in new statutory framework.

Federally established pricing rules would obviate negotiations since such rules would predetermine prices. Likewise, they would negate the state commission's authority to determine whether prices are just and reasonable under Section 252 and substitute in its stead a mere ministerial obligation to see that the Commission's rules are carried out. This result is inconsistent with the intent of Congress and is contradicted by the express language of the statute.[57]

### 2. TSLRIC Is An Inappropriate Costing Standard

Many commenters advocate the use of TSLRIC as the cost basis upon which to establish prices for interconnection and unbundled elements For many parties, TSLRIC is both the beginning and ending point in the cost/pricing inquiry.[58] Commenters, such as AT&T, would have the Commission believe that TSLRIC is compatible with the Commission's competitive

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[57] For interconnection and unbundled elements the Act is unambiguous-- "Determinations by a State commission of the just and reasonable rate... " §252(d)(1).

[58] DOJ at 33, Sprint at 43, MCI at 59-62, American Communication Services at 41-42, Cable & Wireless at 34

policies and the statutory requirements of the Act.[59] Despite arguments to the contrary, any approach that pegged the prices of interconnection and unbundled network elements to TSLRIC would result in a gross underrecovery of costs.

A fundamental flaw in a TSLRIC, or any incremental cost pricing approach advocated by many competitors is that it does not take into account joint and common costs. It is well understood by economists that a multiproduct firm that experiences economies of scale and/or scope, such as firms within the telecommunications industry, cannot generate sufficient revenue to recover the total costs of the firm if it prices all of its services at a measure of incremental cost, including TSLRIC. Pricing exactly to equal incremental costs will not be sufficient to recover shared and common costs. In these circumstances, even in a fully competitive market, prices would need to include contributions toward the recovery of joint and common costs.

Proponents of TSLRIC pricing just ignore the essential cost characteristics of LEC networks. While some commenters would prefer to lightly dismiss the issue of joint and common cost recovery,[60] the Act and sound regulatory policy do not afford such an easy escape route.[61] Implementation of Sections 251 and 252 of the Act are pieces of a broader puzzle that regulators must solve: paying for the network. As Chairman Hundt stated:

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59 See, e.g., AT&T at 48.

60 For example, both MCI at. 67-68, and AT&T at 62 attempt to justify ignoring joint and common costs by making unsupported assertions that such costs are small. Of course, the amount of joint and common costs is not the issue in any event. Regardless of the size, which will likely vary among incumbent LECs, each LEC is entitled the recovery of its total costs, including joint and common costs.

61 The recovery of joint and common costs is not trivial. BellSouth, for example, estimates that nearly 50 percent of its total costs are joint and common costs. These joint and common costs such as land and buildings and computer systems are actual, incurred costs that must be recovered through charges that are assessed by BellSouth for its services and for interconnection and network elements.

> It is true that setting prices for all services at long run incremental cost will not pay for the entire network. In addition, telecommunications is an incredibly dynamic industry, with declining costs over time. Therefore, taking the economists' perspective that we should adopt forward looking costs as a pricing principle will not fully compensate the network investments of the past.[62]

Recognizing the dilemma that setting prices exactly at incremental costs causes, Chairman Hundt explicitly recognized that pricing does not end with an incremental cost study regardless of whether it is called LRIC or TSLRIC:

> One other point should be clearly stated--in adhering to the strictures of Section 251 incumbent LECs must, at the very minimum, be permitted to charge for forward looking joint and common costs.[63] (emphasis added)

Nor is Chairman Hundt alone in his understanding that prices set at TSLRIC would not meet the statute's requirements for cost based charges. Even DOJ and Sprint, who both advocate TSLRIC as a costing approach, understand that adjustments are essential to capture at least forward-looking joint and common costs.[64] Absent these minimum adjustments, no price based on TSLRIC could pass statutory muster nor could it be non-confiscatory.

Permitting the recovery of joint and common costs does not cure the infirmities of TSLRIC as proposed in the Comments of some parties. While commenters would have the Commission believe that the TSLRIC methodology that they have proposed will measure forward-looking costs of an efficient firm, the fact of the matter is that the concept of TSLRIC that these parties are advocating is a measurement of forward-looking costs that is purely

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62 "The Telecommunications Act of 1996: Evolution Not Revolution," Speech of Reed Hundt, Chairman, Federal Communications Commission, delivered at Northwestern University, Chicago, Illinois, May 10, 1996.

63 Id. at 6. Chairman Hundt recognized that in competitive markets, "firms recover joint and common costs by marking up their products differently, depending on the elasticity of demand for the specific product, or by the specific class of consumer." Id.

64 DOJ at 32; Sprint at 45.

hypothetical without any firm connection to the reality of existing LEC networks. As presented, TSLRIC is a measurement of forward-looking costs when an entire network is being started from scratch. Alternatively, if a network already exists, the TSLRIC method replaces it in its entirety. Neither alternative is a likely situation.

The crucial point that seems to be lost on the proponents of TSLRIC is that, even in the long run, current technology and capital equipment in place in the network do not become irrelevant for the provision of future services. The ILEC must take its existing network into account when quantifying its forward-looking economic costs. This assures the efficient operation of the existing network.

Commenters are simply wrong that the appropriate cost basis under the Act is the most efficient possible network. Such a cost basis is neither economically rational nor permissible under the Act. The pricing standard in the Act requires that a LEC's charges for interconnection and unbundled elements be cost based. The plain and obvious meaning of the Act is that such charges reflect actual costs. While the Act may afford new entrants in the local market the opportunity to use the facilities and equipment of an ILEC, the Act also provides that LECs can assess reasonable charges based on their costs of providing interconnection and network elements. Any other construction would be confiscatory

Some commenters incorrectly argue that hypothetical TSLRIC costs would meet statutory requirements because Section 252 prohibits state commission from determining cost on the basis of a rate-of-return or other rate-based proceedings [65] These commenters mistakenly believe that the Act's prohibition of conducting rate-base proceedings only permit consideration of forward-

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[65] DOJ at 28; AT&T at 17.

looking costs in the establishment of charges for network elements and interconnection. Nothing in the language of the statute or its legislative history support this conclusion. Instead, the statute prevents commissions from engaging in detailed proceedings to determine a rate base, a rate-of-return and revenue requirements. There is no way to derive from this prohibition the conclusion that only forward-looking incremental costs satisfy the Act's pricing standard.

Even assuming *arguendo* that forward-looking costs are the only costs that can be considered in the pricing of interconnection and unbundled network elements, it still does not follow that hypothetical costs would satisfy the Act's requirements. Costs based on the existing network of a LEC can also be calculated using an incremental methodology.

Some commenters attempt to justify pricing on the basis of hypothetical costs with arguments that such prices would provide the right investment incentives for competitive facilities-based entry.[66] The logic of these arguments is baffling. For example, basing prices on costs of a hypothetical, idealized network would mean that every time a new cost reducing technology is developed, ILECs would have to reduce prices even though their existing networks are not being modified. In these circumstances, two incorrect signals would be sent. With regard to ILECs, such a pricing rule would discourage new investment because recovery of that investment is jeopardized due to forced price reductions that would be imposed because of subsequent technology advances.

At the same time, competitors will have absolutely no incentive to build their own networks. It would make no economic sense for a competitor to build a network when it can be assured that regulators will guarantee that the price it pays for using an existing LEC network will

66 DOJ at 29.